UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI

JESSICA and JESSIE SIEMS, individually and as next friends and guardians of J.S., a minor,	§	
Plaintiffs,	§	
vs.	§	**Case No. 4:13-CV-00796-ODS**
BUMBO INTERNATIONAL TRUST F/K/A JONIBACH MANAGEMENT TRUST, BUMBO PTY. LTD. and TARGET CORPORATION,	§	
Defendants.	§	

PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION TO EXCLUDE OPINIONS OF DR. MICHAEL S. WOGALTER

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Plaintiffs Jessica and Jessie Siems, individually and as Next Friends and Guardians of J.S., a Minor, ("Plaintiffs") file this Response to Defendants' Motion to Exclude Expert Testimony of Dr. Michael S. Wogalter (Dkt. 62), and would respectfully show the Court as follows:

SUMMARY

Defendants ask the Court to exclude Dr. Wogalter—an undoubted expert in human factors psychology with a particular expertise in product warnings—based on an unsupportable assertion that his testimony would not be helpful to the jury. This presumption ignores the numerous courts in this Circuit which have held that human factors experts *will* and *do* assist jurors in determining whether warnings are adequate. Defendants would also have the Court exclude Dr. Wogalter's testimony based on their usurpation of the jury's role in deciding facts in dispute as part of their efforts to claim that Dr. Wogalter's opinions are unreliable. Finally, Defendants ask the Court to exclude unidentified portions of Dr. Wogalter's testimony that they claim are extraneous. Defendants' weak attempts to exclude Dr. Wogalter does not obscure the fact that he is qualified, his opinions are reliable and would greatly assist the jury in determining disputed issues of fact. Accordingly, the Court should deny Defendants' Motion to Exclude Opinions of Dr. Michael S. Wogalter.

ARGUMENT AND AUTHORITIES

A. Legal Standard

Under Federal Rule of Evidence 702:

> A witness who is qualified as an expert by knowledge, skill, experience, training or education may testimony in the form of an opinion or otherwise if:
>
> (a) The expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
> (b) the testimony is based on sufficient facts or data;
> (c) the testimony is the product of reliable principles and methods; and

(d) the expert has reliably applied the principles and methods to the facts of the case.

FED. R. EVID. 702. The Court is required to make a "preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology can be applied to the facts in issue." *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 592-93 (1993). The primary purpose of any *Daubert* inquiry is for the district court to determine if that expert, "whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." *Kumho Tire Co., Ltd. v. Carmichael,* 526 U.S. 137, 152 (1999). Rule 702 reflects an attempt to liberalize the rules governing the admission of expert testimony. *See Jenson v. Eveleth Taconite Co.,* 130 F.3d 1287, 1298 (8th Cir. 1997). The rule 'is one of admissibility rather than exclusion." *Weisgram v. Marley Co.*, 169 F.3d 514, 523 (8th Cir. 1999) *aff'd*, 528 U.S. 440 (2000) (quoting *Arcoren v. United States,* 929 F.2d 1235, 1239 (8th Cir. 1991)). The trial judge has "considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable." *Kumho,* 526 U.S. at 152; *see Jaurequi v. Carter Mfg. Co., Inc.,* 173 F.3d 1076, 1083 (8th Cir. 1999). Doubt regarding "whether an expert's testimony will be useful should generally be resolved in favor of admissibility." *Clark v. Heidrick,* 150 F.3d 912, 915 (8th Cir. 1998).

When presented with a motion to exclude an expert, trial courts should engage in a three part inquiry to assess whether: (1) the testimony assists the trier of fact, through the application of scientific, technical, or specialized expertise, to understand the evidence or to determine a fact in issue; (2) the expert is qualified to assist the trier of fact by competently testifying to the matters he intends to address; and (3) the methodology by which the expert reaches his conclusions is sufficiently reliable as determined by the sort of inquiry mandated in *Daubert*. *Lauzon v. Senco*

Products, Inc., 270 F.3d 681, 686 (8th Cir. 2001). The proponent of the testimony does not have the burden to prove that it is scientifically correct, only that by a preponderance of the evidence, it is reliable. *Allison v. McGhan Med. Corp.*, 184 F.3d 1300, 1312 (11th Cir. 1999). "An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed." FED. R. EVID. 703.

When evaluating whether a methodology is reliable the Court may consider many factors, including "(1) whether the theory or technique 'can be (and has been) tested'; (2) 'whether the theory or technique has been subjected to peer review and publication'; (3) 'the known or potential rate of error'; and (4) whether the theory has been generally accepted." *Lauzon v. Senco Products, Inc.*, 270 F.3d 681, 687 (8th Cir. 2001) (quoting *Peitzmeier v. Hennessy Indus., Inc.,* 97 F.3d 293, 297 (8th Cir. 1996) (citing *Daubert,* 509 U.S. at 593–94)). But the Court must still be flexible, and its focus should be "solely on principles and methodology, not the conclusions that they generate." *Id*.

B. Dr. Wogalter's testimony is relevant to both Plaintiffs' affirmative warnings claims and as a defense to Defendants' allegations of contributory negligence.

Defendants initially suggest to the Court that Dr. Wogalter should be excluded if Plaintiffs' affirmative warnings-related claims are dismissed through summary judgment. Although Plaintiffs' claims absolutely have merit and should not be dismissed, if they were, Dr. Wogalter's opinions and testimony would still relevant as a rebuttal to Defendants' contributory negligence defense. *See* Jonibach's Original Answer to Pls.' First Am. Compl. at ¶¶ 80-81, 83, Dkt. 50 (filed April 24, 2014); Bumbo Int'l Trust Original Answer to Pls.' First Am. Compl at ¶¶ 80, 81, 83; Counterclaims ¶ 3, Dkt. 36 (filed November 21, 2013); Target Corp.'s Original Answer to Pls.' First Am. Compl at ¶¶ 80, 81, 83; Counterclaims ¶ 3, Dkt. 37 (filed November 21, 2013). The Defendants cannot claim that J.S.'s parents are contributorily/comparatively negligent because they failed to read or adhere to the warnings without permitting Plaintiffs to offer rebuttal, expert testimony that the warnings were inadequate – which is precisely what Dr. Wogalter will do.

C. Dr. Wogalter's opinions will assist the jury in determining fact issues in dispute.

Defendants also argue that Dr. Wogalter's testimony should be excluded because it will not be helpful to the trier of fact. Defendants' argument, however, wholly ignores not only Dr. Wogalter's comprehensive analysis of the Bumbo's Seat's warnings, but also the entire scientific field known as human factors. Because Dr. Wogalter's opinions regarding the inadequacy of the Bumbo Seat's warnings are both helpful and far-beyond the purview of an average juror, his testimony should be allowed.

i. Under Missouri law whether a warning is defective based on its placement, legibility and/or language is a question of fact for the jury.

When analyzing warnings in the context of a warnings defect or failure to warn claim, the trier of fact "must consider "the placement of the warning, its language and how it may or may not impress the average user.'" *Johnson v. Medtronic, Inc.*, 365 S.W.3d 226, 235 (Mo. Ct. App. 2012) (citing *Brown v. Bay State Abrasives*, 821 S.W.2d 531, 533 (Mo. App. 1991)); *see also Tennis v. Gen. Motors Corp.*, 625 S.W.2d 218, 226 (Mo. Ct. App. 1981) (finding expert testimony appropriate on the impact of a warning, considering its wording, design and placement); *Ware v. Whiting Corp.*, 405CV01332 AGF, 2007 WL 2409751, at *4 (E.D. Mo. Aug. 20, 2007). "In evaluating these factors, the dangerous nature of the product, the form in which it is used, the burden to be imposed by requiring warnings and the likelihood that the particular warning will be adequately communicated to those who will foreseeably use the product must also be considered." *Id.* "A warning, no matter how well stated or placed, is inadequate if it has no reasonable likelihood of reaching a foreseeable user and, thereby performing its intended function of risk reduction." *Id.* Under Missouri law, the adequacy of a warning is left to the jury. *Moore v. Ford Motor Co.*, 332

S.W.3d 749, 758 (Mo. 2011) (affirming jury verdict on product warning); *Hackett v. Wabash R. Co.*, 271 S.W.2d 573, 577-78 (Mo. 1954) (the "adequacy of a warning given [is] generally [a] jury question."); *see also Tune v. Synergy Gas Corp.*, 883 S.W.2d 10, 14 (Mo. 1994).

ii. Dr. Wogalter is qualified to provide an opinion on the adequacy of the Bumbo warnings and his testimony will assist the jury.

Dr. Wogalter is an expert in human factors and ergonomics with a particular expertise in warnings. He has a bachelors in psychology from the University of Virginia, a Masters in human experimental psychology from the University of South Florida and a Ph.D. in human factors psychology from Rice University. (Ex. A, Wogalter CV). He is currently a professor of psychology at North Carolina State University, where he teaches courses on human factors, safety, design and warnings, and serves on the editorial boards of industry publications. (*Id.*). He has authored hundreds of peer-reviewed articles on consumer product warnings and their effectiveness. (*Id.*). Defendants do not claim that Dr. Wogalter is unqualified to render opinions as a human factors/warnings expert—instead, they argue that a jury would not be assisted by his testimony because "advanced knowledge is not needed to interpret the warnings provided with the Bumbo Seat." Defs.' Mot. at 7.

Defendants fundamentally misunderstand human factors psychology. Human factors and ergonomics is a discipline incorporating engineering, psychology, physiology, pedagogy and knowledge of human capabilities and limitations in a variety of contexts including, work place safety, human error, product design, product warnings and interaction with products and warnings. (Ex. B, Declaration of Dr. Michael Wogalter). Human factors psychologists apply information regarding human behavior, perception and cognition to the creation and evaluation of products and warnings. (*Id.*). Relevant considerations include human physical characteristics; sensory, perceptual, and cognitive processes; responses to environmental factors; and personal factors. (*Id.*).

The purpose of this work is to ensure that products and their warnings are designed to be compatible with known and complex biomechanical, physiological, psychological, information processing, and anthropometric characteristics. (*Id.*). Human factors experts are frequently called in to assist with the design of consumer products and to ensure that proper warnings and instructions accompany them. (*Id.*). Federal regulatory agencies often rely human factors expertise as the foundation for rules and standards for regulatory and certification requirements. (*Id.*).

It is an oversimplification of this complex field to insinuate that simply because the jury is capable of looking at a warning—particularly one that is explicitly brought to their attention—they have sufficient knowledge and experience to determine that the warning is adequate. This is precisely why many courts have permitted human factors experts to testify on the adequacy of warnings and found such testimony helpful. *Berg v. Johnson & Johnson*, 940 F. Supp. 2d 983, 1001 (D.S.D. 2013) (permitting human factors experts to testify as to "whether there was a feasible way to place a warning" on a product); *Ware v. Whiting Corp.*, 405CV01332 AGF, 2007 WL 2409751 (E.D. Mo. Aug. 20, 2007) (recognizing testimony of human factors experts' testimony on placement and content of warnings); *J.D.O. ex rel. Oldenburg v. Gymboree Corp.*, 12-CV-71 SRN/JSM, 2013 WL 6196970 (D. Minn. Nov. 27, 2013) (denying summary judgment where human factors expert testified that "human factors professionals have long known that the public is less likely to heed warnings on familiar products or products with which they have had repeated benign experience"); *Kersting v. Buckhorn, Inc.*, 05-0898-CV-W-ODS, 2007 WL 4986244 (W.D. Mo. Aug. 27, 2007) (Ortrie, J.) (permitting human factors experts to testify regarding the adequacy of the warnings); *Curbow v. Nylon Net Co., Inc.*, 07-3106-CV-S-JCE, 2008 WL 4186919 (W.D. Mo. Sept. 5, 2008) (permitting human factors expert that "relied on specialized knowledge regarding design hierarchy, knowledge of consumer product design, knowledge of the safety considerations for consumer products, knowledge of mechanical design, and human factors" to testify); *Burks v. Abbott Labs.*, 917 F. Supp. 2d 902, 921 (D. Minn. 2013) (allowing human factors expert to testify "about the adequacy and effectiveness of the warnings provided are based on well-established theories regarding how humans interact with warning labels. His experience and expertise allow him to provide reliable and useful opinions."); *see also Zwicki v. Superior Mach. Co. of S. Carolina*, CIV00-1942(DSD/SRN), 2002 WL 34365098, at *4, n.6 (D. Minn. July 31, 2002) ("The principles and methodology of human factors and industrial safety design are well-established academic fields and have been the subject of peer-reviewed published scholarship for numerous years"); *Finke v. Hunter's View, Ltd.*, 596 F. Supp. 2d 1254, 1261 (D. Minn. 2009) (permitting human factors expert to testify); *Robinson v. Newell Window Furnishings, Inc.*, 4:10CV1176 JCH, 2012 WL 3043014 (E.D. Mo. July 25, 2012) (same); *Doblar v. Unverferth Mfg. Co., Inc.*, 981 F. Supp. 1284, 1285 (D.S.D. 1997) (same).[1]

Indeed, Dr. Wogalter's opinions go into numerous factors that are well-beyond the common knowledge of the average lay-person, including:

- the relevant literature and studies regarding effective warnings, as well as industry standards for appropriate and effective warnings, such as ANSI Z535 standards (Ex. C, Wogalter Report, at 19-20)[2];

[1] The cases cited by Defendants are inapposite. In *Sexton v. Sears, Roebuck & Co.*, 4-00-0068-CV-W-1-ECF, 2001 WL 36102767, at *1 (W.D. Mo. Oct. 9, 2001), the court excluded expert testimony about how retail merchandise should be displayed and the expert himself even testified that only common sense was needed to evaluate the issues. Moreover, the case primarily alleged that Sears had failed to follow its own guidelines when setting up the aisle display. *Id*. Wogalter's opinions on the other hand, cannot be gleaned from common sense and involve issues outside the scope of an average person's knowledge. Likewise, *Haskins ex rel. Haskins v. Helzberg*, 05-0134-CV-W-GAF, 2006 WL 6869428, at *3 (W.D. Mo. Feb. 17, 2006), the court excluded expert testimony regarding the dangers and risks associated with using cell phones while driving after concluding that the issue was *irrelevant* to a general negligence claims. Again, this is not the case with Wogalter's opinions, which are relevant to the specific failure to warn claims and as rebuttal to Defendants' contributory negligence assertions.

[2] ANSI Z535 standards refers to the alter standards put forth by the American National Standards Institute for consumer products.

- accepted concepts of hazard control and the hazard control hierarchy for consumer products (Ex. C at 4-7)[3];
- the expected lifespan of warnings and the likelihood that the on-product Bumbo warnings would smudge, rub off or become degraded to the point of being illegible (Ex. C at 8-10)[4];
- the relationship between simple, safe-appearing products and informational leaflets/pamphlets and the need to make consumer encounters with those warnings documents interactive in order to increase the likelihood that they will be read (Ex. F at 9-10);
- warning salience and noticeability factors that go to consumer attention to and ability to read a warning such as:
  - text size (very small, particularly relative to the available surface area),
  - location (where caretakers would not be able to see it—on the back—or which would be potentially obstructed by normal use with the tray—on the side),
  - poor quality printing (likely to become faded, smeared or ill-formed),
  - font-justification (warning is center justified, but left justified is easier to read),
  - capitalization (all the letters are capitalized although mixed case is easier to read), and
  - organization of text (provided in a single chunk as opposed to easier to read bullet points) (Ex. C at 12-16).
- the investigations and warnings analysis that should have been undertaken in light of industry standards and research (Ex. C at 4, 6-7, 17);
- what information was excluded from the warnings in light of the hazard control goals (Ex. C at 15-16, 18-19);
- the symbols that could have been created or utilized to identify the specific risk at issue as opposed to generalized risk (Ex. C at 16);
- the reaction to and interaction with warnings in light of conflicting messages regarding the safety of the product, e.g. the suggestions that the Bumbo would keep the child restrained, lack of seat belts, and lack of specific warning that the child could suddenly eject itself from the Bumbo seat at any time (Ex. C at 3, 11-13, 16-21);

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[3] The hazard control hierarchy is the accepted approach for dealing with hazards in consumer products: first, manufacturers should design around any hazards (e.g. altering the height of the seat back); if not feasible, then manufacturers should guard against any hazards (e.g. installing a seat belt). Warnings should only become the primary method of controlling hazards when design-arounds or guarding are not feasible options. An average juror would not have an understanding of this hierarchy, which is necessary to put the importance of the warnings into context within the entire manufacturing process. Here, where the Defendants made no efforts to design around or guard against known hazards, instead relying exclusively on warnings to mitigate against injuries, the warnings' effectiveness becomes more critical than if they had been presented in conjunction with other safety measures.

[4] The average juror would not understand the expected lifespan of an on product warning. Likewise, the average juror would not be able to appreciate how easily or the high likelihood that the on-product warnings would become degraded in some fashion.

- marketplace expectations regarding safety of consumer products generally and safety of products used for children, government regulations thereof, and role of CPSC (Ex. C at 16-21);
- motivations to search for and read warnings on products believed to be inherently safe (Ex. C at 16-21); and
- retailer options and ability to add additional warnings based on knowledge of risks. (Ex. C at 20).

Dr. Wogalter's expertise permits him to evaluate the warnings in the context of industry standards and expectations; he knows what does and does not work, and what Bumbo should and should not have done. A juror would not know this information and would only be able to evaluate the warnings in the vacuum of trial. Essentially, Dr. Wogalter's expert opinion can be distinguished from that of a layperson in the sense that Dr. Wogalter can explain *why* the warnings are inadequate, which will permit a juror to determine *if* the warnings are inadequate.

Dr. Wogalter's testimony is particularly important given the context of the discussion: because the trier of fact will know the consequences of using the Bumbo Seat before they are presented with the warnings themselves, they will have a bias toward comprehending the warning that would not necessarily exist if they had seen the warning for the first time upon receiving the seat as the intended consumer. As Bumbo notes in its motion "[t]he warnings are directed to the average consumer and are meant to be understood by the average consumer"—Dr. Wogalter will assist the jury in understanding how an average consumer *outside of the litigation context* would interpret the warnings.

Defendants ignore all of this and point the Court to dicta in an opinion issued in another case, *Blythe v. Bumbo Int'l Trust*, 6:12-CV-36, 2013 WL 6190284 (S.D. Tex. Nov. 26, 2013). But, Judge Costa's statements regarding Dr. Wogalter were not made in the context of a fully briefed and argued *Daubert* motion. They were issued *sua sponte* as part of a summary judgment ruling—entered after a jury trial on the merits—based on Texas law. Because the plaintiffs in that case did not have the opportunity to explain why Dr. Wogalter's human factors analysis significantly differed from the understanding of an average lay person, this Court should not look to Judge Costa's ruling as precedential; Judge Costa did not have the benefit of the explanations provided above before making his ruling.

For all these reasons, Dr. Wogalter's testimony would be helpful to the jury and Defendants motion to exclude should be denied.

D. Dr. Wogalter's opinions are reliable and based on facts and information available.

Bumbo only challenges the reliability of Dr. Wogalter's opinion based on its assertions that (1) he did not consider the leaflet that allegedly came with the seat, and (2) he evaluated an older version of the warnings on the product's box. But Dr. Wogalter *did* consider the leaflet. And, Dr. Wogalter absolutely evaluated the Bumbo Seat's box, as is evident from the photographs and text that appear in Dr. Wogalter's report. (Ex. C at 11-13).

Ms. Siems testified that she did not recall seeing a leaflet inside the Bumbo Seat box when she opened it. (Ex. D, Jessica Siems Depo at 31:12-14). Mr. Siems never saw a leaflet either. (Ex. E, Jessie Siems Depo at 13:10-12). Plainly, there is a fact question as to whether or not it was actually in the box when it entered the stream of commerce, assuming for purposes of this motion only, that this is the relevant inquiry.[5] As this is also a question of fact for the jury to resolve, there is no requirement that Wogalter analyze the leaflet warnings that may not have even been available

[5] Defendants argue that Missouri law requires that the warnings to be analyzed are "those that were provided when the product entered the stream of commerce." Mot. at 8. This is not, however, supported by the case they cite. In *Tuttle v. Steris Corp.*, No.4:12-CV-1487 (CEJ), 2014 WL 1117582, at *8 (E.D. Mo. Mar. 20, 2014), the court granted summary judgment because the plaintiff had not provided any evidence that "the ***product*** was defective at the time it entered the stream of commerce." (citing *Duke v. Gulf & Western Mfg. Co.*, 660 S.W.2d 404, 418 (Mo. App. 1983); *Boyer v. Bandag, Inc.*, 943 S.W.2d 760, 763 (Mo. App. 1997)). This case says absolutely nothing about considering the ***warnings*** that accompanied the product when it entered the stream of commerce.

to the Siems. Although Wogalter reasonably determined that he need not explicitly discuss the possibly-present insert in this specific report, he did incorporate by reference a report in Defendants' possession authored in another case. (Ex. C, Wogalter Report at 12). In the incorporated report, Wogalter offered extensive analysis regarding the leaflet, including the following: (1) why the nature of the Bumbo Seat, including its simple and benign appearance, would lead consumers not to read the leaflet warning, (2) why this disinclination made the leaflet's loose placement in the box defective because forced interaction with the leaflet was necessary to insure that consumers read it, and (3) why the language contained on the leaflet was inadequate. (Ex. F, Wogalter Report in Ferrell, at 9-10).

Ms. Siems also testified that after she purchased the Bumbo Seat, she did not really look at the box and threw it away as soon as she took the seat out of it. (Ex. D, Jessica Siems Depo at 30:21-31:11). She has no recollection as to what warnings were or were not on the box, all she remembers is that the box was oddly shaped. (Ex. D, Jessica Siems Depo at 30:2-6). Mr. Siems was not present when his wife purchased the seat and never saw the box. (Ex. E, Jessie Siems Depo at 12:7-9; 13:7-9).

Regardless of the fact that the precise language on the box cannot be established because like most consumers, the Siems disposed of their box immediately after they received the Bumbo Seat (Ex. C at 13), Dr. Wogalter analyzed the language and photographs that Bumbo claims would have appeared on the Siems' box, and he discusses why those warnings were wholly inadequate. To begin, Dr. Wogalter analyzed the warning language on the box itself, and he opines that when that language is accompanied by the largest images on the box – the photographs of the product and product endorsements – the box "conveys a sense of appropriateness of using the product in a variety of situations, and does not warn in any adequate way that the Bumbo seat should only be used on the floor." (Ex. C. at 13). He also opines that much of the material on the box serves as an "anti-warning" because when users think that a product is safe (because of the multiple large endorsements from outside institutions) they are less likely to look for or read warnings. (Ex. C at 13). Dr. Wogalter clearly outlines why the small warning language on the product was not effective in warning against the product's use on elevated surfaces. (Ex. C at 11-13).

It would seem that Bumbo's criticism is with the following two sentences that appear in Dr. Wogalter's report that Bumbo claims would not have appeared on the Siems' box: (1) "Bumbo is a versatile baby seat that can be used on any flat surface," and (2) Bumbo is happiest on the floor." With the exception of these two sentences, the warning language that Dr. Wogalter evaluated (Ex. C at 12) is identical to that which Bumbo claims would have appeared on the box for the Siems' Bumbo Seat. Regardless, in concluding that the warning language on the Bumbo box was inadequate, Dr. Wogalter does not specifically analyze these two sentences, which Bumbo was forced to remove from the packaging as part of the 2007 recall. Instead, Dr. Wogalter discusses why the warning language on the box as a whole was ineffective and unlikely to draw the attention of a consumer, such as the Siems – who disposed of the box immediately without ever noticing the warnings. (Ex. C at 11-13). Thus, Dr. Wogalter's opinions about the inadequacy of the warnings on the Bumbo Seat's box are relevant, reliable, and helpful to the trier of fact.

Moreover, these alleged deficiencies in Dr. Wogalter's report do not relate to the reliability of his opinion, but its completeness and credibility. Any challenges that Defendants have to the basis for Dr. Wogalter's opinions should be raised through "[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof," not exclusion. *Daubert*, 509 U.S. at 596. Dr. Wogalter's testimony is reliable; Defendants have failed to show that it is inadmissible. Accordingly, in light of the many factual issues left to be determined by the jury, the weight to be afforded Dr. Wogalter's testimony should likewise rest with the jury at trial and the Court should deny Defendants' motion to exclude.

E. Defendants have not identified the portions of Dr. Wogalter's opinions that they claim are extraneous.

Defendants vaguely assert that there are "numerous" areas of Dr. Wogalter's report on which he should not be permitted to testify. However, Defendants only provide two examples of subjects they claim to be outside his expertise. Not only are Defendants incorrect—each of the identified subjects are properly within the scope of his testimony—but they cannot seek to have Dr. Wogalter's testimony limited with respect to areas that they have not identified.

First, Defendants claim that Dr. Wogalter should not be permitted to testify regarding design changes and whether they would make the Bumbo safer. But Dr. Wogalter does not have any opinions regarding what would make the product safer or whether any design changes would have prevented J.S.'s injuries. As part of his discussion regarding the consumer product safety hierarchy, he provides *examples* of design changes to the Bumbo that have been suggested by other experts as a way of explaining the difference between hazard control through design-arounds, guarding and warnings. He clearly states that he is not offering an opinion on whether or not these alternatives would definitively make the product safer, but only mentions "some design and guarding considerations to give some *context* to [his] main area of expertise, which is the third strategy of hazard control—to warn about the hazard." (Ex. C at 6). This testimony is proper as a means of explaining his opinions regarding the hazard control hierarchy. Moreover, as he explains in his report, his analysis of adding restraints to control the risk that infants will unexpectedly fall out of the seat is supported both by the 2012 CPSC Recall, requiring Bumbo to add seatbelts to its product, and the testing Defendants' hired Exponent to conduct. (Ex. C at 17).

Second, Defendants claim that Dr. Wogalter cannot speculate as to the views of CPSC staff regarding the Bumbo seat. Although Defendants do not specifically identify the allegedly offending opinion, Dr. Wogalter makes only one statement in his report with respect to the beliefs of the CPSC: "I believe CPSC knew from the outset when they got involved with the Bumbo that seatbelts was the better solution in comparison to warning about the hazard, but nonetheless allowed Bumbo to use an added warning." (Ex. C at 20). This opinion, however, is based on Dr. Wogalter's knowledge and experience of CPSC intervention in the realm of consumer products, the CPSC's understanding of the hazard control hierarchy and the subsequent CPSC recall requiring the addition of seatbelts. If Defendants wish to challenge this opinion, they should do so through cross-examination and presentation of contrary evidence. *Daubert*, 509 U.S. at 596.

Although these are the only examples that Defendants have been able to point to as allegedly extraneous, Defendants ask the Court to exclude other unidentified portions of Dr. Wogalter's opinions. As all of Dr. Wogalter's opinions are proper and within the scope of his expertise, Plaintiffs are unable to identify which portions of the report should allegedly be limited or excluded. The Court should therefore deny Defendants' motion to exclude or limit Dr. Wogalter's testimony.

CONCLUSION

For the reasons explained above, Bumbo's Motion to Exclude Opinions of Dr. Michael S. Wogalter should be denied in its entirety.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was served on counsel of record via CM/ECF on July 14, 2014, in accordance with the Federal Rules of Civil Procedure.

/s/ M. Ross Cunningham
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